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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re SOPHIA H., a Person Coming
Under the Juvenile Court Law.

B292387

DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. 18CCJP01420A)

Plaintiff and Respondent,

v.

ARLENE G.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County, Rudolph A. Diaz, Judge. Reversed with directions.

Christine E. Johnson, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel and Aileen Wong, Deputy County
Counsel for Plaintiff and Respondent.

Sophia H. was detained from her mother and placed with her father following mother's arrest for drug trafficking. At the time Sophia was detained, there was evidence that mother was involved with the Mexican mafia and had been part of a criminal conspiracy to smuggle drugs into a Mississippi prison. The only basis for jurisdiction pled in the juvenile dependency petition, however, was that mother "possessed heroin, within access of the child." The juvenile court sustained the petition, and mother appealed.

We conclude there was not substantial evidence that mother possessed heroin to which Sophia had access. We therefore reverse the jurisdictional and dispositional orders, vacate all orders issued after the dispositional hearing, and order the trial court to dismiss the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Sophia was born in August 2011. Sophia's parents, Arlene G. (mother) and Jorge H. (father), lived together briefly, but separated shortly after Sophia's birth. Prior to these proceedings, Sophia lived primarily with mother, but regularly visited father.

A. Background

In February 2018, mother was arrested by the United States Drug Enforcement Administration (DEA) and local law enforcement for drug trafficking. DCFS detained six-year-old Sophia from mother and released her to father. Mother was released from custody on bail the same day.

A federal indictment filed in the Northern District of Mississippi alleged that mother and others conspired to smuggle controlled substances, including heroin and methamphetamines, into a Mississippi prison. With regard to mother, the indictment alleged that in 2016, mother communicated through text

messages with a prisoner named Enrique C. “for the purpose of directing the shipment of drugs and the transfer of funds related to the drug-trafficking conspiracy.” Once the drugs were successfully smuggled into the prison, mother was alleged to have directed the transfer of funds through PayPal and various banks. The conspiracy was alleged to have begun in early 2016, and to have ended in December 2016, approximately a year before the indictment was filed.

In a “Last Minute Information for the Court” filed March 5, 2018, DCFS advised the court that it had “received information from [the U.S. Attorney] that [mother] is an associate of the Mexican Mafia and serves a pivotal ‘Secretary’ role in that [mother] keeps records of the heroin that she packages and ships out to the state of Mississippi from her home address [The U.S. Attorney] reported that the mother is instructed by the Mexican Mafia to ship the drugs to a prison guard so the drugs are smuggled into the prison. The ‘Secretary’ role that [mother] holds as an associate of the Mexican Mafia is pivotal to the success of the Mexican Mafia’s organized crime operations. [¶] Law enforcement reported that at one point [mother] did not cooperate with the Mexican Mafia and as a result the Mexican Mafia sent out Gang Members to [her] residence and threatened the mother’s life. As a result of the threats from the Mexican Mafia, the mother relocated to the [M]aternal Grandfather’s home . . . Law enforcement has evidence of the mother weighing heroin and the minor Sophia is present in the background and has full access to the packaging of the heroin.”

In an interview with a DCFS social worker, mother denied any criminal activity or drug use. She said she used to “date” Enrique, who was in prison with her brother in Mississippi, but

she had never met him in person. She and Enrique broke up in 2016 when mother learned he was dating other women. A hearing was scheduled in mother's criminal case in March 2018 in Mississippi, but was continued several times.

Sophia said she had never seen anyone use drugs in her home. She liked living with father, but wanted to return home to mother because she "love[d] and miss[ed] her so much." Father said he knew mother had been dating an incarcerated man, but he had been unaware of mother's alleged criminal activity. The maternal grandfather, with whom mother lived, denied that mother was involved with the Mexican mafia or had engaged in illegal activity.

Mother tested negative for drugs on March 16, 2018.

B. Petition, Jurisdiction, and Disposition

DCFS filed a juvenile dependency petition in March 2018. The single count of the petition alleged that Sophia was a juvenile court dependent pursuant to Welfare and Institutions Code¹ section 300, subdivision (b) because mother "placed the child in a detrimental and endangering situation, in that the mother possessed heroin, within access of the child."

At the June 18, 2018 jurisdictional hearing, counsel for Sophia asked the court to dismiss the petition, urging that it was not supported by substantial evidence. Counsel argued: "It's curious to me that the only information we have is in [the Last Minute Information] on the detention date. There's nothing to support these statements in the jurisdiction [and] disposition report. [¶] If you look at the actual indictment . . . nowhere . . .

¹ All subsequent undesignated statutory references are to the Welfare and Institutions Code.

does it say [mother] ever had possession of drugs. The indictment says [mother] would coordinate and handle the money aspects, but nowhere does it indicate she herself had drugs in her presence, which is really the only thing that's pled here, is that she had heroin within access of the child. [¶] . . . [¶] . . . It's really troubling to me [that] this supposed information from the U.S. Attorney wasn't fleshed out. I don't know who law enforcement is. [¶] Law enforcement says . . . they have evidence of the mother weighing [heroin] in . . . Sophia's presence in the background. Where's the police report that says that? Where's the photos? Where's something to support that? That would have been crucial to have in the jurisdiction [and] disposition report. . . . [¶] . . . [¶] So I'm asking the court to dismiss the petition for lack of evidence."

Mother's counsel joined in the request to dismiss the petition, asserting: "I'm joining with [Sophia's counsel]. The Department is using allegations . . . against mother, to find the petition true. There is absolutely nothing that's been adjudicated against mother. Mother was not convicted of anything. There's nothing in all this paperwork to indicate anything happened with regard to the mother and this case other than allegations only."

The juvenile court sustained the allegation of the petition. It explained: "I think it's clear. The court is going to rely significantly on the [Last Minute Information for the Court] of 3-5-18 with statements of the U.S. Attorney who's prosecuting this case. He indicates that mother has a significant role in the conspiracy to traffic narcotics for the Mexican mafia and that her associate or boyfriend plays a major role in that trafficking. It further indicates that mother actually moved to the [m]aternal grandfather's home as a result of threats made to her for failing

to cooperate with the Mexican mafia. I think this poses a serious concern and risk of harm for the child because of mother's involvement.

"I agree there's no specific and direct evidence that alleges that mother was actually in possession. The fact she's involved in the trafficking conspiracy, at least at minimum she's certainly in possession by constructive possession, but actually the U.S. Attorney's office reports there's evidence she's weighing heroin and that the child is present in the background at the time she's packaging heroin.

"What's significant is the seriousness of the offense and that the child is exposed to mother's activities. She may have second thoughts about her involvement; nevertheless, there's no reason to think she doesn't continue to be part of that enterprise, and that's a criminal enterprise.

"So the Department met its burden of proof, and I am sustaining allegations by [a] preponderance of evidence." (Italics added.)

In August 2018, DCFS told the court that the conspiracy charges in the criminal case against mother would be dismissed, and mother would be entering a plea as to the money laundering charges.

At the August 2018 dispositional hearing, the court ordered that Sophia remain in father's custody, and granted mother limited monitored visitation. Mother was ordered to submit to 10 on-demand drug tests and to participate in parenting education and individual counseling.

Mother timely appealed.²

DISCUSSION

Mother contends that substantial evidence does not support the sole sustained allegation of the petition—that she placed Sophia at risk by possessing heroin. For the reasons that follow, mother is correct.

I.

Legal Standards

In relevant part, section 300, subdivision (b)(1) provides that a child is subject to juvenile court jurisdiction if he or she “has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child”

In the trial court, DCFS has the burden to establish the jurisdictional facts by a preponderance of the evidence. (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.) On appeal, “‘we must uphold the [trial] court’s [jurisdictional] findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.]’” (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1022.)

² While the appeal was pending, DCFS advised this court that in February 2019, the juvenile court had ordered Sophia placed with mother under DCFS supervision.

II.

Substantial Evidence Does Not Support the Sole Sustained Allegation of the Petition

To reiterate, the sustained petition stated: “[Mother] placed the child in a detrimental and endangering situation, in that the mother possessed heroin, within access of the child. Such a detrimental and endangering situation established for the child by the mother endangers the child’s physical health and safety, creates a detrimental home environment and places the child at risk of serious physical harm, damage and danger.”

Mother contends that substantial evidence did not support the sole jurisdictional fact alleged in the petition—that mother “possessed heroin, within access of the child.” We agree.

The only evidence that mother possessed heroin accessible to Sophia was a single report that DCFS had “received information” from a U.S. Attorney that unnamed law enforcement officials have “evidence of the mother weighing heroin and the minor Sophia is present in the background and has full access to the packaging of the heroin.” Significantly for our purposes, the report does not detail *who* the law enforcement officers were, *what* evidence they possessed, or *the basis* for the conclusion that Sophia had “full access to the packaging of the heroin.” As such, we cannot evaluate the substantiality of the evidence that mother possessed heroin accessible to Sophia. (See *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611–613 [expert’s testimony that he “knew” a gang had been involved in certain crimes, without any specifics as to the circumstances of the crimes or when or how the expert obtained the information, was not substantial evidence of criminal activity]; *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130,

157 [statement held “too vague and nonspecific to amount to substantial evidence of anything”].)

Moreover, as courts repeatedly have held, a jurisdictional finding under section 300, subdivision (b), requires, among other things, either “ ‘serious physical harm or illness’ to the child, or a ‘substantial risk’ of such harm or illness.” (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111.) This element “ ‘ ‘effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm *in the future* (e.g., evidence showing a substantial risk that past physical harm will reoccur).’ ” ” (*Ibid.*, italics added.) In the present case, the criminal complaint alleged that the drug trafficking conspiracy ended in December 2016, approximately a year and a half before the dependency petition was adjudicated. There was no suggestion in any of the information before the juvenile court that mother had continued to possess drugs or engage in any illegal activity. Accordingly, there was no evidence that, even if mother had exposed Sophia to illegal drugs in the past, she was likely to do so in the future.

We note that while the juvenile court acknowledged the absence of “specific and direct evidence that alleges that mother was actually in possession” of illegal drugs, it nonetheless concluded that mother’s involvement in the alleged drug trafficking conspiracy constituted “constructive possession” of heroin. Whatever the merits of the court’s constructive possession analysis from a criminal law perspective, the concept simply has no relevance in this proceeding, where the concern is a young child’s access to dangerous substances. Plainly, a child cannot ingest drugs that are *constructively*—but not actually—possessed by a parent. (Compare, e.g., *In re Rocco M.* (1991)

1 Cal.App.4th 814, 825, overruled on another ground in *In re R.T.* (2017) 3 Cal.5th 622, 629 [young child “is subjected to a substantial risk of serious physical harm when he or she is placed in an environment allowing access to drugs, with nothing to prevent [child] from succumbing to the temptation to ingest them”].)

Perhaps recognizing its failure to prove the sole factual allegation of the sustained petition, DCFS urges us to consider additional evidence of risk of harm described in its reports. Such evidence includes that (1) between March and December 2016, mother and others conspired to distribute heroin and methamphetamines to a prison in Mississippi; (2) mother was a secretary for the Mexican mafia; and (3) when mother stopped cooperating with the Mexican mafia, it sent gang members to her residence to threaten her life.

Because none of these facts was pled, none is a basis for sustaining *this petition*. “‘[F]undamental . . . due process’ requires ‘[n]otice of the specific facts upon which removal of a child from parental custody is predicated’ in order to ‘enable the parties to properly meet the charges.’ [Citation.]” (*In re J.O.* (2009) 178 Cal.App.4th 139, 152, fn. 13, overruled on another ground in *In re R.T.* (2017) 3 Cal.5th 622, 628.) “A bare recital of the conclusionary words of the statute does not suffice as notice.” (*In re Jeremy C.* (1980) 109 Cal.App.3d 384, 397.) Accordingly, the juvenile court could not properly consider unalleged conduct in making the jurisdictional finding. (*In re J.O.*, at p. 152, fn. 13.)

We note that a juvenile court may amend a dependency petition to conform to the evidence received at the jurisdictional hearing to remedy immaterial variances between the petition and proof. (§ 348; Code Civ. Proc., § 470.) Here, however, the juvenile

court did not amend the petition to conform to proof. Moreover, even had it done so, we would be bound to reverse because the additional bases the juvenile court discussed in sustaining the petition—namely, mother’s alleged drug trafficking and involvement with the Mexican mafia—was fundamentally different than the parental misconduct alleged. (See *In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1041–1042 [“[T]he ability to amend according to proof plays an important role in the overall dependency scheme. If a variance between pleading and proof . . . is so wide that it would, in effect, violate due process to allow the amendment, the court should, of course, refuse any such amendment.”]; see also *In re Andrew L.* (2011) 192 Cal.App.4th 683, 689 [same].)

Because there is no substantial evidence to support the sustained allegation of the petition, we reverse the order finding Sophia to be a juvenile court dependent, as well as the resulting dispositional order. (§ 356; Cal. Rules of Court, rule 5.684(g).) We express no opinion as to whether the facts discussed in DCFS’s reports would, if properly alleged in a dependency petition, support the juvenile court’s exercise of jurisdiction over Sophia.

DISPOSITION

The jurisdictional and dispositional orders are reversed,
and all orders issued after the dispositional hearing are vacated.
The trial court is ordered to dismiss the petition.

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EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.